IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

OP.No. 30387 of 2001(P)

PETITIONERS:

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1. K. SUPRIYA, PUBLIC HEALTH NURSING TUTOR,
GOVT. SCHOOL OF NURSING,
PALAKKAD.
2. S. SANDHYA, PUBLIC HEALTH NURSING TUTOR,
GOVT. SCHOOL OF NURSING KOTTAYAM.

BY ADV. SRI.K.JAJU BABU
SMT.M.U.VIJAYALAKSHMI

RESPONDENTS:

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1. STATE OF KERALA REPRESENTED BY SECRETARY TO GOVERNMENT,
HEALTH AND FAMILY WELFARE DEPARTMENT,
GOVT. SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE DIRECTOR OF HEALTH SERVICE, THIRUVANANTHAPURAM.

3. INDIAN NURSING COUNCIL, REPRESENTED BY ITS SECRETARY,
KOTLA ROAD, TEMPLE LANE,
NEW DELHI- 2.

4. KERALA NURSES AND MIDWIVES COUNCIL REPRESENTED BY
ITS REGISTRAR, RED CROSS ROAD, TRIVANDRUM – 34.

*ADDL. R5: T. BHAVANANDA, W/O. LATE BALAKRISHNAN,
PUBLIC HEALTH NURSING TUTOR, JUNIOR PH NURSES TRAINING,
CENTRE, THYCAUD, THIRUVANANTHAPURAM.

* (ADDL. R5 IMPLEADED AS PER ORDER DTED 18.08.03 ON I.A.10234/03)

*ADDL. R6: K.P. SHYAMALA AGED 51 YEARS,
W/O. SREENIVASAN, LADY HEALTH SUPERVISOR,
COMMUNITY HEALTH CENTRE, PAPPINESSERY, KANNUR.

*ADDL.R7: P. CHANDRIKA, AGED 51 YEARS, W/O. NARAYANAN,
LADY HEALTH SUPERVISOR, COMMUNITY HEALTH CENTRE,
PAPPINISSERY, KANNUR.

* (ADDL. R6 AND R7 IMPLEADED AS PER ORDER DATED 23.07.04 ON I.A.9417/04)

BY ADV. SRI.V.M.KUTTY MOOSA
SRI.N.RAGHURAJ
SRI.M.V.THAMBAN
GOVERNMENT PLEADER SRI. P.K. RAVIKRISHNAN
SRI.M.RAMASWAMY PILLAI
SRI.NOUSHAD THOTTATHIL,SC,INDIAN NURSIN
SRI.M.RAMASWAMY

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 14/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP.No. 30387 of 2001

ORDERS ON I.A.12646/03, I.A.2587/05 AND C.M.P.49387/01 IN O.P. NO. 30387/01
DISMISSED.

14.03.2007 SD/- S.SIRI JAGAN,JUDGE.

APPENDIX

EXT.P1: TRUE COPY OF REGISTRARION CERTIFICATE DATED 8.7.94 ISSUED TO THE 1ST PETITIONER.

EXT.P2: TRUE COPY OF REGISTRATION CERTIFICATE DATED 5.5.94 OF THE 2ND PETITIONER.

EXT.P3: TRUE COPY OF FACULTY OF MEDICINE CERTIFICATE DT.28.6.2000 OF 2ND PETITIONER.

EXT.P4: TRUE COPY OF ORDER NO.FWA5-120061/93/DHS DATED 31.8.96 ISSUED BY THE 2ND RESPONDENT.

EXT.P5: TRUE COPY OF NOTIFICATION VIDE G.O.(P)NO.290/98/H&FWD DATED 8.10.98 ISSUED BY THE 1ST RESPONENT.

EXT.P6: TRUE COPY OF QUALIFICATIION AND EXPERIENCE REQUIRED FOR VARIOUS POSTS IN NURSING PROFESSION PRESCRIBED BY THE 3RD RESPONDENT ON 27.5.85.

EXT.P7: TRUE COPY OF REPLY VIDE NO.ES(DPC) 60453/2001/DHS DATED 4.9.2001 SENT BY THE 2ND RESPONDENT TO THE 1ST PETITIONER.

EXT.P8: TRUE COPY OF LETTER NO.12-4/90 INC DT. 11.2.99 ISSUED BY THE 3RD RESPONDENT TO 1ST RESPONENT.

/TRUE COPY/

PA TO JUDGE.

S. SIRI JAGAN, J.

O.P.NO. 30387 OF 2001

DATED THIS THE 14th DAY OF MARCH, 2007

JUDGMENT

The petitioners are Public Health Nursing Tutors appointed by direct recruitment. The Government has by Ext.P5 special rules prescribed qualifications for appointment to the post of Public Health Nursing tutor which are as follows:

"3. Public Health Nursing Tutor
(a) By promotion –

1. General: SSLC.
2. Technical : Auxiliary Nurse midwifery Certificate (revised course of 18 months duration) issued by the Kerala Nurses and Midwives Council or its equivalent qualifications.

OR

Auxiliary Nurse Midwifery Certificate/Auxiliary Nurse Midwifery Certificate (revised course)issued by an authority recognised by the Indian Nursing Council

3. Registration with the Kerala Nurses and Midwives Council.

4. Health Supervisor Training course of six months.

5. Two years experience as Lady Health Supervisors

(b) By direct recruitment.-

1. Degree in Nursing issued by a recognised University in India and recognised by Indian Nursing Council.

2. Registration with the Kerala State Nurses and Midwives Council.

3. Two years experience in nursing in Government Hospitals or in an Institution recognised by the Government."

2. The petitioners having come through the channel of direct recruitment, naturally they possess the qualification of Degree in Nursing issued by a University in India recognised by Indian Nursing Council, which is the qualification prescribed for appointment for direct recruitment. The posts to which Public Health Nursing Tutors can aspire for promotion are posts of District Public Health Nurse and Maternal and Child Health Officer. The method of appointment to those posts are also by promotion and in the absence of qualified hands, by direct recruitment. The petitioners in this original petition are aggrieved by the qualifications prescribed for the above two posts in the channel through promotion. For deciding the issue involved in this original petition it would be advantageous to extract here the recruitment

rules applicable to those two posts also which read this:

	"category	Method of appointment	qualification
1.	Materlnal and Child Health Officer	(a) Promotion	1. General: SSLC 2. Technical: Auxiliary Nurse Midwifery Certificate (revised course of 18 months duration) issued by the Kerala Nurses and Midwives Council or its equivalent qualification. OR Auxiliary Nurse Midwifery certificate/Auxiliary Nurse Midwifery certificate(revised course) issued by an authority recognised by the Indian Nursing Council. 3. Registration with the Kerala Nurses and Midwives Council. 4. Health Supervisors Training Course of six months. 5. Two year experience as District Public Health Nurse.
		(b) By direct recruitment	1. Degree in Nursing issued by recognised University in India and recognised by Indian Nursing Council. 2. Registration with the Kerala State Nurses and Midwives Council . 3. Five years experience in Nursing in a Government Hospital or in an institution recognised by the Government.
2.	District	(a) By promotion	1. General: S.S.L.C.

Public Health Nurse		2. Technical: AuxiliaryNurse Midwifery Certificate (revised course of 18 months duration) issued by the Kerala Nurses and Midwives Council or its equivalent qualification. OR Auxiliary Nurse Midwifery certificate/Auxiliary Nurse Midwifery certificate(revised course) issued by an authority recognised by the Indian Nursing Council. 3. Registration with the Kerala Nurses and Midwives Council. 4. Health Supervisors Training Course of six months. 5. Two year experience as District Public Health Nurse.
	(b) By direct recruitment	1. Degree in Nursing issued by recognised University in India and recognised by Indian Nursing Council. 2. Registration with the Kerala State Nurses and Midwives Council . 3. Three years experience in Nursing in a Government Hospital or in an institution recognised by the Government.”

3. The complaint of the petitioners is that for appointment by promotion the only qualifications prescribed are S.S.L.C. and Auxiliary Nurse Midwifery certificate and degree in Nursing has been

completely excluded from the qualifications prescribed for promotion to the said two posts. The petitioners would contend that since they are Public Health Nursing tutor directly recruited having qualifications of Degree in Nursing and the method of appointment prescribed for the two promotion posts are by promotion from the immediate lower category, the persons, who have been directly recruited as Public Health Nursing Tutor have been completely excluded in the matter of promotion to the said two posts ,which according to them is patently arbitrary, unreasonable and discriminatory. They would submit that when the post of Public Health Nursing Tutor has been made a feeder category to the post of District Public Health Nurse and the post of Public Health Nurse has been made a feeder category for promotion to the post of Maternal and Child Health Officer, the persons, who have been appointed by direct recruitment having higher qualifications cannot be excluded from consideration for promotion to those posts by prescribing a lesser qualification, which they do not possess as the only the qualification for promotion to those posts.

4. The 1st respondent has filed a counter affidavit in the original petition which does not deal with the very specific contention of the petitioners in the original petition. In the counter affidavit, they have stated matters which do not have any bearing on the question raised before me. The contesting respondent

namely, the additional 5th respondent would strongly support the special rules. According to them simply because the qualification of degree in Nursing is not prescribed as a qualification for promotion to the higher posts, the special rules do not become unreasonable or arbitrary. They would submit that the persons like the additional 5th respondent, who do not have the qualification of B.Sc Nursing cannot aspire for promotion to the posts of Vice-Principal and Principal for which graduation in Nursing is compulsory. The petitioners, who have that qualification can aspire for direct recruitment to those posts and therefore the prescription of lesser qualification for promotion to the posts to which they can aspire for promotion amounts to reasonable classification which cannot be validly challenged by the petitioners.

5. The learned counsel for the 5th respondent also refers to the judgment in W.A.No.2740/98, which according to him would have the effect of upholding the special rules which have been challenged by the petitioners. Additional respondents 7 to 11 also filed counter affidavit and their counsel vehemently supported the special rules and the contentions raised by the additional 5th respondent.

6. I have considered the rival contentions in detail. A mere perusal of the special rules would show that persons, who have been appointed as Public Health Nursing Tutors by direct

recruitment cannot aspire for promotion to the posts of Public Health Nurse and consequently for the further post of Maternal Child Health Officer because degree in Nursing is not one of the qualifications prescribed for appointment by promotion to the posts of District Public Health Nurse and Maternal Child Health Officer. It is settled law that once, persons chosen from two different channels are appointed to a particular post, in respect of all further promotions, the persons appointed through both channels should have equal opportunity for promotion to higher posts unless of course a ratio is prescribed by special rules. Here not only has any ratio been prescribed, the persons, who have been directly recruited to the post of Public Health Nursing Tutor have been completely excluded from consideration for appointment by promotion to the post of District Public Health Nurse and Maternal and Child Health Officer by prescribing only the qualification prescribed for persons who come through the channel of promotion and by excluding the qualification prescribed for those who come through direct recruitment. I do not think that a detailed intellectual exercise would be necessary to hold that such a prescription would be arbitrary, unreasonable and discriminatory. The petitioners would refer to a Division Bench decision of this Court in **N.C.Narayanan Nair Vs. State of Kerala (1988 (1) KLT 894)**, which lays down situations in which unreasonableness of a statutory rules can be

presumed. Paragraphs 9 to 12 are relevant in this regard, which are extracted below:

> "9. The appellants contend that the amendment to rule 5 made in 1986 is unreasonable, unjust and unworkable and thus beyond the rule making power conferred under the Public Services Act and is violative of Article 14 of the Constitution as it draws Sweepers from other Departments to be promoted as Hospital Attendants without regard to the experience gained and without reference to the unaccustomed and unfamiliar tasks associated with Sweepers in hospitals. It is said that Sweepers in hospitals are, for all practical purposes. Hospital Assistants Grade II except that the Sweepers belong to the Part-time Contingent staff and the Hospital Attendants belong to the higher grade of Last Grade Servants.
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> 10. xxx xxx xxx
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> 11. Un reasonableness of a statutory rule, uncertain in its language and unworkable in its operation, leading to the resonable conclusion that it is manifestly arbitrary, can invalidate the rule as beyond the powers conferred under the statute, for "no authority would have intended to give authority apart from the violation of a fundamental right under Article 14. This principle is no longer in doubt especially after Lord Justice DiPlock's statement of the law in Mixam's Properties Ltd. V. Chertsey Urban District Council (1964 (1) Q.B. 215) thus:
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> "*Thus the kind of unreasonableness which invalidates bye-law is not the antonym of "reasonableness" in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say:"Parliament never intended to give authority to make such rules:they are unreasonable and ultra vires*"

and its affirmation by the Supreme Court in the Indian Express case (AIR 1986 Sc 515) thus:-

"*A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned"*.

It may also be questioned on the ground that it is unreasonable, not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the judges would say "parliament never intended authority to make such rules. They are unreasonable and ultra vires"

12. Ina recent decision in Pankajakshy Vs. George Mathew (1987 (2)KLT 723) after referring to the various decisions of the Supreme Court, it was stated thus:-

"Thus the rule made under a statute by an authority delegated for the purpose can be challenged on the ground (1) that it is ultra vires of the Act (2) it is opposed to Fundamental Rights; (3)it is opposed to other plenary laws. To ascertain whether a rule is ultra vires of the Act, the Court can go into the question (a) whether it contravenes expressly or impliedly any of the provisions of the Statute; (b) whether it achieves the intent and object of the Act; and © whether it is "unreasonable" to be manifestly arbitrary, unjust or partial implying thereby want of authority to make such rules".

7. From a reading of the said decision and applying the ratio to the facts of the case, I have no doubt in my mind that the said decision squarely applies to the challenge against the qualifications prescribed for recruitment by promotion to the posts

of District Public Health Nurse and Maternal and child Health Officer. Therefore the special rules to the said two posts in so far as it does not prescribe Degree in Nursing also as a qualification for promotion to those posts is unreasonable and discriminatory. Accordingly, the Special Rules to those two posts to that extent is hereby struck down. The Government is therefore directed to frame fresh special rules in accordance with the directions in this judgment and make promotions to those posts only in accordance with the revised special rules to be framed in accordance with the directions in this judgment. This shall be done within a period of six months from the date of receipt of a copy of this judgment and promotions shall be made to vacancies available in those posts as expeditiously as possible thereafter.

Original petition is allowed as above.

S. SIRI JAGAN, JUDGE

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